

FED MAIL SECTION

Federal Communications Commission

DA 98-209

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DISPATCH

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
Amendment of Section 73.202(b),) MM Docket No. 98-17
Table of Allotments,) RM-8819
FM Broadcast Stations.)
(Beaver Dam and Brownsville, Kentucky))

NOTICE OF PROPOSED RULE MAKING

Adopted: January 28, 1998; Released: February 13, 1998

Comment Date: April 6, 1998

Reply Comment Date: April 21, 1998

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making and supplement filed by Charles M. Anderson ("petitioner"), permittee of Station WAUE(FM), Channel 264A, Beaver Dam, Kentucky, proposing the substitution of Channel 264C3 for Channel 264A at Beaver Dam, and the reallocation of Channel 264C3 from Beaver Dam to Brownsville, Kentucky.¹ Petitioner also requests that Station WAUE(FM)'s construction permit be modified to specify operation on Channel 264C3 at Brownsville, Kentucky, as its new community of license. Petitioner states his intention to apply for the channel, if reallocated to Brownsville.

2. Petitioner seeks to invoke the provisions of Section 1.420(i) of the Commission's Rules, which permit the modification of a station's license to specify a new community of license without affording other interested parties an opportunity to file competing expressions of interest. See Modification of FM and TV Authorizations to Specify a New Community of License, 4 FCC Rcd 4870 (1989), recon. granted in part, 5 FCC Rcd 7094 (1990). In support of his proposal, petitioner states that Brownsville is an incorporated community with a population of 897² persons and has a mayor-council form of government. It is the county seat of Edmonson County (population 10,357) and is also the retail and financial center for the county. Petitioner

¹This petition for rule making was initially dismissed by letter on November 28, 1996. On December 30, 1996, petitioner filed a petition for reconsideration. In light of the action taken herein, we will dismiss the petition for reconsideration as moot.

²All population figures are taken from the 1990 U.S. Census.

further states that it is the location of the county courthouse and several county offices. Brownsville has two banks, over 50 retail establishments, a weekly newspaper, an elementary and high school, three churches, and a Chamber of Commerce. Moreover, petitioner asserts that because Mammoth Cave National Park is located in Edmonson County and attracts a significant number of tourists, county tourism revenue for 1995 increased by 6.6% over 1994 to \$59,068,157. Petitioner notes that Brownsville is a growing community with a 65.5% gain in population in 20 years. Petitioner contends that the reallocation will not deprive Beaver Dam of an "existing service" since the station is unbuilt, citing Midway, Panacea and Quincy, Florida, 10 FCC Rcd 6122, para. 6 (1995). Furthermore, petitioner asserts that the reallocation to Brownsville will result in a preferential arrangement of allotments by serving the goals of Section 307(b) of the Communications Act of 1934, as amended, by providing a first local transmission service to Brownsville. By way of contrast, retaining Station WAUE(FM), Channel 264A, in Beaver would trigger priority four because it would be a second local transmission service to Brownsville. This is due to the fact that Station WSNR(AM) (1600 kHz) has recently been reallocated from Hartford to Beaver Dam, Kentucky.³ Petitioner also asserts that the reallocation will provide new service to 103,729 persons, while theoretically only 19,696 persons would lose reception service, who already receive at least five full-time reception services. The reallocation would result in a net gain in population of 84,033 persons to an area of 853 square kilometers (329 square miles); and an area of 142.4 square kilometers (55 square miles) containing 1,208 persons will gain a fifth full-time reception service.

3. Based on the information before us, we believe that the proposal warrants consideration since the reallocation of Channel 264C3 to Brownsville, Kentucky, could provide the community with its first local aural transmission service under our allotment priorities,⁴ and would allow Station WAUE(FM) to expand its service area. In addition, the proposed reallocation and change of community of license to Brownsville would not result in a loss of service to Beaver Dam since Station WAUE(FM) is unbuilt and since Station WSNR(AM) has been reallocated and has changed its community of license from Hartford to Beaver Dam. An engineering analysis has determined that Channel 264C3 can be allotted to Brownsville in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction at petitioner's requested site.⁵ As requested, we shall also propose to modify the station's construction permit to specify operation on Channel 264C3 at Brownsville

³A license (File No. BLH-970912KC) was issued on December 11, 1997, and Station WSNR(AM) is operating in Beaver Dam.

⁴The FM allotment priorities are: (1) First full-time aural service; (2) Second full-time aural service; (3) First local service; and (4) Other public interest matters. [Co-equal weight given to priorities (2) and (3)]. See Revision of FM Assignment Policies and Procedures, 90 FCC 2d 88 (1982).

⁵The coordinates for Channel 264C3 at Brownsville are North Latitude 37-10-34 and West Longitude 86-18-08.

as its new community of license. In accordance with the provisions of Section 1.420(i) of the Commission's Rules, we shall not accept competing expressions of interest in the use of Channel 264C3 at Brownsville, Kentucky, or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

4. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the communities listed below, to read as follows:

<u>City</u>	<u>Channel No.</u>	
	<u>Present</u>	<u>Proposed</u>
Beaver Dam, Kentucky	264A	---
Brownsville, Kentucky	---	264C3

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before April 6, 1998, and reply comments on or before April 21, 1998, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Brian M. Madden, Esq.
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2000 K Street, N.W., Suite 600
Washington, D.C. 20006
(Counsel for Petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules, 46 FR 11549, February 9, 1981.

8. IT IS ORDERED, That the Petition for Reconsideration filed by Charles M. Anderson, IS DISMISSED as moot.

9. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no ex parte presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An ex parte presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an ex parte presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an ex parte presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Attachment: Appendix

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the Notice of Proposed Rule Making to which this Appendix is attached.

2. Showings Required. Comments are invited on the proposal(s) discussed in the Notice of Proposed Rule Making to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. Cut-off protection. The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules).

(b) With respect to petitions for rule making which conflict with the proposals in this Notice, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. Comments and Reply Comments; Service. Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the Notice of Proposed Rule Making to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be

accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. Number of Copies. In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. Public Inspection of Filings. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Reference Center (Room 239) at its headquarters, 1919 M Street, N.W., Washington, D.C.